ATTACHMENT E

From: va11ima.pub@mail.house.gov [mailto:va11ima.pub@mail.house.gov]
Sent: Wednesday, September 05, 2001 12:20 PM
Subject: Responding to your message

Thank you for your letter expressing your opposition to H.R. 1542, the Internet Freedom and Broadband Deployment Act of 2001. As one who is opposed to this legislation, I greatly appreciate hearing from you.
New technologies and innovation in services and service delivery are promising to improve telecommunications for individuals and small businesses alike. Today, the overwhelming majority of residential Internet users access the Internet through the same telephone line used for traditional voice communication. But consumer expectations are evolving with the anticipation of widespread broadband deployment.

Currently, the expansion of high-speed Internet access through the deployment of broadband to the American home is being financed and implemented by the private sector. Competitive carriers, following the promises of the 1996 Telecommunications Act, invested over $50 billion in new telecom networks; for the past 2 years, they have committed over $1 billion per month for DSL-type broadband connectivity alone. And thousands of high-skilled, high-paying jobs have been created nationwide.
From a public policy perspective, the goals are to ensure that broadband deployment is timely, that industry competes fairly, and that service is provided to all sectors and geographical locations of American society. Section 706 of the Telecommunications Act of 1996 (P.L. 104-104) required the Federal Communications Commission (FCC) to determine whether "advanced telecommunications capability [i.e., broadband or high-speed access] is being deployed to all Americans in a reasonable and timely fashion." If this is not the case, the Act directs the FCC to "take immediate action to accelerate deployment of such capability by removing barriers to infrastructure investment and by promoting competition in the telecommunications market."

On January 28, 1999, the FCC adopted a report pursuant to Section 706 which concluded that "the consumer broadband market is in the early stages of development, and that, while it is too early to reach definitive conclusions, aggregate data suggests that broadband is being deployed in a reasonable and timely fashion." The FCC announced that it would continue to monitor closely the deployment of broadband capability in annual reports and that, where necessary, it would "not hesitate to reduce barriers to competition and infrastructure investment to ensure that market conditions are conducive to investment, innovation, and meeting the needs of all consumers." Similarly, an FCC staff report issued on July 19, 1999, concluded that regulation should not "automatically" be imposed on new technologies, and that when Internet-based services replace traditional legacy services, the FCC should "begin to deregulate the old instead of regulate the new." At the same time, the report cautioned that the FCC should "maintain a watchful eye to ensure that anticompetitive behavior, such as bottlenecks and tying, do not develop, and be careful that any regulatory responses are the minimum necessary and outweigh the costs of regulation."

While the FCC's position is not to intervene at this time, some assert that legislation is necessary to ensure fair competition and timely broadband deployment. Currently, the debate centers on two specific proposals: 1) compelling cable companies to provide "open access" to competing Internet Service Providers, and 2) easing certain legal restrictions and requirements, imposed by the Telecommunications Act of 1996, on incumbent telephone companies that provide high-speed data (broadband) access.
Access to broadband services has prompted policymakers in Congress to examine a range of issues to ensure that broadband will be available on a

timely and equal basis to all U.S. citizens. One issue under examination is whether present laws and subsequent regulatory policies as they are applied to the RBOCs (the Regional Bell Operating Companies which include Verizon, SBC, Qwest, or BellSouth) are thwarting the deployment of broadband services. The two primary regulations of concern are the restrictions placed on Bell operating company provision of long distance services within their service territories, and network unbundling and resale requirements imposed on all incumbent telephone companies.

As a result of the 1984 AT&T divestiture, the Bell System service territory was broken up into service regions and each assigned to an RBOC. The geographic area in which an RBOC may provide telephone services within its region was further divided into local access and transport areas, or LATAs. These LATAs total 164 and vary dramatically in size. LATAs generally contain one major metropolitan area, and an RBOC will have numerous LATAs within its designated service region.

Restrictions contained in Section 271 of the Telecommunications Act of 1996 prohibit the RBOCs from offering interLATA services within their service regions until certain conditions are met. RBOCs seeking to provide such services must file an application with the FCC and the appropriate state regulatory authority that demonstrates compliance with a 14-point competitive checklist of market-opening requirements. The FCC, after consultation with the Justice Department and the relevant state regulatory commission, determines whether the RBOC is in compliance and can be authorized to provide in-region interLATA services. To date, Verizon has received this approval in New York, Connecticut and Massachusetts, while SBC has earned approval in Texas, Oklahoma, and Kansas. The independent telephone companies, or non-BOC providers of local service, are not subject to these restrictions and may carry telephone traffic regardless of whether it crosses LATA boundaries.

As you may know, H.R. 1542 was introduced this year by Representative Billy Tauzin (R-LA), Chairman of the House Energy and Commerce Committee, and Representative John Dingell (D-MI). The bill unravels the two core components of the 1996 Telecom Act that were designed to spur competition in local telecommunications services. First it removes the unbundling and resale requirements and immediately allows the RBOCs to offer interLATA services without having to meet the 14-point competitive checklist contained in Section 271.

On April 25, 2001, the bill would was considered by the full House Energy and Commerce Committee. The following day, H.R. 1542 was marked up and approved in the Subcommittee on Telecommunications and the Internet. On May 9th, the full Committee marked up the legislation, where it passed by a smaller-than-expected margin of 32-23. As a Member of both the Committee and Subcommittee, I voted against the bill on both occasions.

The April hearing on H.R. 1542 did serve an important objective in giving Committee members the opportunity to measure the extent to which the Telecommunications Act of 1996 has achieved its ultimate purpose: To unleash competition in all forms of telecommunications services in order to increase the quality and lower the prices of those services for American consumers. While judicial action brought competition to the long-distance market, the passage of the 1996 Act hailed Congress' recognition that to achieve network-wide competition, we had to prescribe a recipe that would similarly bring competition to the local telecom market. As in any market, only then would consumers benefit from lower prices, advanced services, technological innovation, and increased investment in information infrastructure. The strategy is simple. Offer the RBOCs an incentive to open their local monopolies so that conditions for market competition in the local loop will flourish.

For these reasons, I strongly disagree with the path taken in H.R. 1542. It would irrevocably defeat the purpose of the Act by destroying the efforts made to bring competition to the local loop. Given the 100 years in which the RBOCs were able to build their monopoly, 5 years is a severely

inadequate period of time by which Congress should measure the success of the 1996 Act. By eliminating the applicability of Section 271 to in-region inter-LATA data and the requirement that the Incumbent Local Exchange Carriers (ILECs) provide their network elements to competitors on an unbundled basis, this legislation will destroy any incentive for the ILECs to open up their local loop to competition. At this time, the ILECs possess monopolistic control in over 90% of their markets nationwide. In Virginia, Verizon controls 96% of the phone lines. Clearly, competition in the local markets targeted by the 1996 Act has not yet arrived.

I have also heard concerns that cable companies do not face a regulatory environment, and that in order for the RBOCs to keep pace with cable broadband deployment, Congress must treat the RBOCs in a similar fashion by prohibiting the imposition of federal and state regulations. This argument fails to account for a number of facts. First, cable companies are not completely deregulated; they do face regulatory authority in their franchise agreements with local governments. In addition, the Bell companies built their networks over decades with a monopoly profit guaranteed by the government. Captive ratepayers paid for the Bells' infrastructure. and in exchange for granting the Bell system a monopoly, the government mandated certain build-out requirements to help ensure affordable and universal phone service to every consumer. With a government-guaranteed monopoly rate of return, the Bells assumed no risk. In stark contrast, the cable companies built their networks in the 1980s using private capital with no guaranteed profit. As well, I do not believe that a duopoly-where the only two choices available to consumers are either the Bell company or the cable company-translates into competition.

Furthermore, H.R. 1542 would ultimately retard speedy deployment of broadband technologies to consumers. With little competition in the space that brings wired digital services into homes and businesses, there will be no competitors or market forces to push their widespread provision of broadband markets. However, I disagree with the notion that broadband deployment is not moving at a market-induced pace and that as a result, the RBOCs are the only entities capable of delivering the service in the wired market. Statistics prove that broadband deployment is indeed moving forward. At the end of 2000, the DSL market had 2,429,189 lines in service, a 389% increase from year end 1999. ILECs accounted for 78% of the total, followed by CLECs with 21%. SBC has almost ten times as many subscribers as of March 2001 as in the 4th quarter of 1999, increasing from 115,000 subscribers to 954,000 subscribers, and at the same time, raising the price of that service by 25%. Over that same time period, SBC's DSL availability has doubled: from 10.2 million customer locations to 21.7 million customer locations. Furthermore, the Act in no way prohibits the ILECs from offering inter-LATA voice or data service in out-of-region areas, but to date, only Qwest has invested in the infrastructure to move into those areas.

In the same vein, I am puzzled by the arguments put forth by the RBOCs that they need the relief contained in H.R. 1542 in order to incentivize their use of capital to deploy broadband. When SBC announced their Project Pronto initiative in October 1999, they touted plans to spend $6 billion over the following 3 years to bring high speed connections to 80% of the homes, or 77 million Americans in its region. At the same time, SBC promoted its expectation of saving $1.5 billion per year in operating costs and gaining $3.5 billion in revenues by 2004 as a result of the upgrades. SBC appears well on its way to meeting that goal, having reported a DSL expansion to 50% of its customer base at the end of the first quarter 2001. BellSouth reported that it would achieve greater than 70% deployment of DSL services by the end of 2001, and Verizon has stated that by the end of the first quarter for 2001, it had upgraded 47% of its lines to DSL.

Finally, the proposition that the RBOCs are the only entities capable of bringing broadband to the rural corners of America is seriously undermined by the fact that rural in-region access lines are being sold by the millions. The RBOCs have already divested 10 million rural lines. As well, Qwest CEO Joe Nacchio has publicly discussed the idea of selling off rural in-region access lines, including possibly the operations of some entire

states, leaving Qwest free to focus on the 8 to 12 metropolitan areas that it considers strategically important. GTE, now part of Verizon, has sold 393,673 rural lines since last summer.

I agree that deregulation is always preferable for encouraging market forces. But the 1996 Act already provides for deregulation-so long as there is competition. A monopoly will never voluntarily welcome competition-and of course, it makes rational business sense that they would not. Deregulation for deregulation's sake is bad for consumers and it's bad for our economy. To remove the carrot that is embodied in Section 271 and allow ILECs to close off access to the local loop is simply obliterating the Act's ultimate goal: to foster competition in the local telecom markets.

Again, thank you for taking the time to express your concerns to me. Should you have any additional comments, please do not hesitate to contact me. I look forward to hearing from you.

Sincerely,

Tom Davis
Member of Congress

ATTACHMENT F

SBC's $6 Billion Project Pronto Initiative Brings DSL Internet to 80% of its Customers

IN THIS SECTION
Project Pronto
DSL Internet
ATM
SONET
ISDN
Frame Relay
Advanced Service

RELATED LINKS

Through Project Pronto, SBC is creating a broadband network unrivaled in terms of customers reached and access speeds offered. SBC is equipping additional central offices, pushing fiber deep into neighborhoods and placing neighborhood broadband gateways at the end of the fiber to push the capabilities now housed in central offices closer to customers. This will make virtually all customers in targeted markets eligible for DSL Internet service.

Through Project Pronto, SBC will:

- Provide an estimated 77 million Americans – about 80 percent of its Southwestern Bell, Ameritech, Pacific Bell, Nevada Bell, and SNET customers – with high-speed voice, data and video services via Digital Subscriber Line (DSL) Internet service by the end of 2002. Ultimately, the company intends to make broadband service available to all of its customers.
- Rearchitect its network to push fiber deeper into the neighborhoods it serves and packetize voice traffic, which will significantly improve the efficiency of the network.
- Dramatically reduce its network cost structure. Expense and capital savings alone are expected to offset the cost of the entire initiative.
- Create a platform to deliver emerging services including voice-over-DSL Internet, and video services such as video on demand and personal videoconferencing, interactive online gaming and enable customers to take advantage of home networking.

Project Pronto Progress
SBC's Project Pronto is named as such for a reason: progress is rapid, and every month, DSL Internet becomes available to additional homes and businesses across the country.

- DSL Internet is available to approximately 18 million homes and businesses.
- More than 1,250 central offices are DSL equipped.
- 516,000 DSL lines in service at the end of Q3.

For more information about Project Pronto, click on the documents below:

Get the free **Acrobat Reader**
The Adobe® Acrobat Reader lets you view and print PDF files on all major computer platforms.

News Release

SBC Launches $6 Billion Initiative to Transform It Into America's Largest Single Broadband Provider
'Pronto' to Provide 'e-Tone' - Dialtone for the Internet - to 77 Million Americans, Accelerate Company's Move to Advanced Voice, Data, Video Converged Network

Maps: Maps of Top Cities in SBC's Service Area, Pre- and Post-Project Pronto.

All maps are available in .pdf format.

Southwestern Bell SNET

ATTACHMENT G

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Paved With Good Intentions: How InterLATA Data Relief Undermines the Competitive Provisions of the 1996 Act

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I. INTRODUCTION

Just over five years ago, former President Clinton signed the Telecommunications Act of 1996 ("1996 Act") into law, effectively opening long-shut doors to competition.[1] Today, Congress faces the question whether to close those doors once again. H.R. 1542, the "Internet Freedom and Broadband Deployment Act of 2001," seeks to provide Bell Operating Companies ("BOCs") with interLATA relief for the provision of data services. This allows BOCs to provide data services across the LATA boundaries that have restrained them for the nearly two decades since the breakup of AT&T, without complying with the competitive provisions of the 1996 Act. H.R. 1542 aims to lift limitations on "consumer choice and welfare"[2] and to "bridge" the "digital divide."[3] The newly introduced H.R. 1542 takes the place of its identical twin from the 106th Congress, H.R. 2420.[4] This Note illustrates how legislative initiatives like H.R. 1542 not only will fail their essential purpose, but also will harm the consumer

1. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified at scattered sections of 47 U.S.C.).

2. Internet Freedom and Broadband Deployment Act of 2001, H.R. 1542, 107th Cong. § 2(a)(6) (2001).

3. *See* discussion *infra* Part V.

4. *Internet Freedom and Broadband Deployment Act of 2001: Hearing of the House Energy and Commerce Committee*, 107th Cong., Fed'l News Serv., Apr. 25, 2001, LEXIS, FedNew File [hereinafter *Hearing on H.R. 1542*] (statement of Rep. Billy Tauzin) ("In 1999, we introduced H.R. 2420, which was the identical bill we refiled again yesterday.").

choice and welfare they claim to protect.

As the market moves toward convergence among and within telecommunications industries, legislators evaluating H.R. 1542 must remember the purpose underlying AT&T's divestiture and the subsequent competitive provisions of the 1996 Act: "Free and open competition brings about the lowest possible prices and the mix of services that is most closely aligned with consumers' preferences."[5] Until the local exchange markets are open to robust competition, some regulation must remain in place to afford more choice and lower prices to consumers. If enacted, H.R. 1542 will destroy consumer choice and raise prices by toppling the painstakingly constructed balance struck by the 1996 Act.

In the past few decades, the climate has transformed for telecommunications companies from unification to fragmentation and back again. Part II of this Note discusses the beginning of this cycle, the divestiture of AT&T, which imposed the original restrictions on BOCs with respect to the provision of interLATA service. Part III describes the competitive provisions of the 1996 Act, which replaced the twelve-year-old restrictions imposed by the divestiture of AT&T.[6] In light of this history, H.R. 1542 attempts to solve the problem of the digital divide by providing expansive interLATA relief for data services. Part IV examines the problem of the digital divide, and Part V provides the background of H.R. 1542. As this Note will show, several feasible solutions superior to H.R. 1542 already exist to address the same problem. Part VI discusses alternatives to changing the current law and why these alternatives are far better than H.R. 1542's heavy-handed solution. Part VII argues that the critical shortcoming of H.R. 1542 is not that it represents an ill-fitting, duplicative solution to the problem of the digital divide, but rather that it will harm consumers in rural and urban areas by eliminating choice and raising prices.

II. THE HISTORY OF THE BELL OPERATING COMPANIES

To properly understand the debate surrounding this type of

5. David M. Mandy, *Progress and Regress on InterLATA Competition*, 52 FED. COMM. L.J. 321, 343 (1999).

6. 47 U.S.C. § 152(a)(1) (Supp. IV 1998).

> Any conduct or activity that was, before the date of enactment of this Act [Feb. 8, 1996], subject to any restriction or obligation imposed by the AT&T Consent Decree shall, on and after such date, be subject to the restrictions and obligations imposed by the Communications Act of 1934 [47 U.S.C. [§] 151 et seq.] as amended by this Act and shall not be subject to the restrictions and the obligations imposed by such Consent Decree.

Id.

legislation, one must understand the terminology and law that arose out of the divestiture of AT&T. The entrance of MCI and other companies into the long-distance market in the 1970s first foreshadowed a potential antitrust action against AT&T.[7] Despite competition from MCI and others, AT&T still commanded about eighty percent of the long-distance market in the late 1970s and early 1980s.[8] The Justice Department ("DOJ") leveled an antitrust suit against AT&T in 1974,[9] because "in the absence of restrictions on their ability to enter new lines of business, the BOCs would cross-subsidize competitive services with their monopolized local services, and would discriminate against competing long-distance companies when providing the connection to the local network."[10]

On January 15, 1981, proceedings commenced before Judge Harold Greene in the DOJ's case to break up AT&T's monopoly.[11] Cross-subsidization and other monopolistic tactics formed the impetus behind the divestiture: "[A]s long as local exchange service providers were allowed to sell long-distance service, competition in long-distance service could not be free and open."[12] On January 8, 1982, AT&T and the DOJ announced a settlement to break up AT&T, which they called the Modified Final Judgment ("MFJ" or "divestiture agreement").[13] Almost two years later, on

7. Eric M. Swedenburg, Note, *Promoting Competition in the Telecommunications Markets: Why the FCC Should Adopt a Less Stringent Approach to Its Review of Section 271 Applications*, 84 CORNELL L. REV. 1418, 1426 (1999).

8. *See* Eli M. Noam, *Federal and State Roles in Telecommunications: The Effects of Deregulation*, 36 VAND. L. REV. 949, 967 (1983) (estimating the share at 84.9%); United States v. AT&T, 552 F. Supp. 131, 171 (D.D.C. 1982) (AT&T conceded that its share was 77% in 1981.), *aff'd mem. sub nom.* Maryland v. United States, 460 U.S. 1001 (1983).

9. Swedenburg, *supra* note 7, at 1428.

10. Jerry A. Hausman & J. Gregory Sidak, *A Consumer-Welfare Approach to the Mandatory Unbundling of Telecommunications Networks*, 109 YALE L.J. 417, 428 (1999).

11. STEVE COLL, THE DEAL OF THE CENTURY: THE BREAKUP OF AT&T 163 (1986); *AT&T*, 552 F. Supp. 131.

12. Mandy, *supra* note 5, at 325.

13. COLL, *supra* note 11, at 359. *See also* ROBERT W. CRANDALL, AFTER THE BREAKUP 39 (1991); ALAN STONE, WRONG NUMBER: THE BREAKUP OF AT&T 271-72 (1989). The district court ratified this agreement on August 24, 1982, in the Modification of Final Judgment, often confusingly referred to as the MFJ. *Modification of Final Judgment*, United States v. AT&T, 552 F. Supp. 131 (D.D.C. 1982), *aff'd mem. sub nom.*, Maryland v. United States, 460 U.S. 1001 (1983). *See also* Deployment of Wireline Servs. Offering Advanced Telecomms. Capability, Request by Bell Atl.-W. Va. for Interim Relief Under Section 706, or in the Alternative, a LATA Boundary Modification, *Fourth Report and Order and Memorandum Opinion and Order*, 15 F.C.C.R. 3089, para. 9, 19 Comm. Reg. (P & F) 555 (2000) [hereinafter *LATA Relief Order*]. Judge Greene refused to refer to the original agreement as the Modified Final Judgment "because the name was derived from the maneuverings before Judge Biunno in New Jersey, which Greene never accepted as legal." COLL, *supra* note 11, at 359.

January 1, 1984, the divestiture agreement took effect.[14] As part of that agreement, LATAs and BOCs were born.[15]

A. *BOCs*

The divestiture agreement separated the long-distance portion of AT&T's business from its local service portion.[16] Separate companies, BOCs, were formed to provide local service. As part of the divestiture, BOCs were grouped into seven, roughly equivalently sized, Regional Bell Operating Companies ("RBOCs").[17] The original seven have, through mergers, now become four: SBC, Verizon, Qwest, and BellSouth.[18] Under the terms of the divestiture, the BOCs were not allowed to manufacture equipment or, more importantly, to provide long-distance service.[19]

B. *LATAs*

Prior to divestiture, BOCs had operated within geographically designated areas.[20] The divestiture agreement in *U.S. v. AT&T* further fragmented these regions into local access and transport areas ("LATAs").[21] A LATA defines the area in which a BOC may offer local exchange service.[22] LATAs generally follow state boundaries, contain more area in sparsely populated regions, and encompass the territory of only one RBOC.[23] Currently, 196 LATAs exist in North America.[24]

The MFJ prohibited BOCs from providing service across a LATA boundary ("interLATA" service).[25] "This limitation restricted the BOCs to providing service only for calls originating and terminating within the same

14. COLL, *supra* note 11, at 362.

15. *See id.* at 268-81.

16. *Id.* at 270.

17. HARRY NEWTON, NEWTON'S TELECOM DICTIONARY 740 (16th ed. 2000). These seven companies included Ameritech, Bell Atlantic, BellSouth, NYNEX, Pacific Telesis ("PacTel"), Southwestern Bell, and U S West. *Id.*

18. Southwestern Bell changed its name to SBC and merged with SNET and Ameritech. Bell Atlantic merged with NYNEX and GTE and redubbed itself Verizon. Finally, in the only case to date of a nonBOC taking over a BOC, Qwest took over U S West. FCC, Common Carrier Bureau, Policy and Planning Division, *Mergers of Common Carriers Requiring FCC Approval*, *at* http://www.fcc.gov/ccb/Mergers (last updated Sept. 27, 2000). Some fear these mergers indicate a trend toward remonopolization. *Don't Let Telecom Competition Vanish*, BUS. WK., Apr. 23, 2001, at 130.

19. NEWTON, *supra* note 17, at 109.

20. Swedenburg, *supra* note 7, at 1428-29.

21. NEWTON, *supra* note 17, at 521-22.

22. *Id.*

23. *Id.*

24. NEWTON, *supra* note 17, at 521-22.

25. Swedenburg, *supra* note 7, at 1428-29.

LATA ("intraLATA" calls). These line-of-business restrictions constituted the heart of the MFJ and dramatically changed the structure of the telecommunications industry by forcing the BOCs out of the long-distance market."[26] In February 1996, the competitive provisions of the 1996 Act supplanted the authority of the MFJ.[27]

III. THE ROLE OF THE TELECOMMUNICATIONS ACT OF 1996

The 1996 Act replaced the MFJ with sections 251, 252, and 271.[28] These sections immediately permitted some interLATA service, if such service was provided outside the legacy region of a BOC.[29] These sections also provided the "carrot" of complete interLATA relief for a BOC if it could prove to the Federal Communications Commission ("FCC" or "Commission") that it had complied with the market-opening provisions of section 251.[30] The 1996 Act also arguably transferred jurisdiction over LATA boundary questions from the district courts to the FCC.[31] Certainly, section 271 provided the Commission with the exclusive authority to determine whether a BOC could provide in-region interLATA service.[32]

Taken together, sections 251, 252, and 271 comprise the competitive provisions of the 1996 Act.[33] These sections provide a mechanism to open the monopolistic local exchange market to competition. Section 251 sets forth the obligations of incumbent local exchange carriers ("ILECs") and BOCs to share their facilities with competitors.[34] Section 271 provides the opportunity for BOCs to provide interLATA voice and data services by satisfactorily opening their networks as required by section 251.[35]

26. *Id.*

27. *See* 47 U.S.C. §§ 251, 252, 271 (Supp. IV 1998).

28. *Id.* § 152(a)(1).

29. *Id.* § 271(b)(2). BOCs are free to provide out-of-region interLATA service without the approval of the FCC: "A Bell operating company, or any affiliate of that Bell operating company, may provide interLATA services originating outside its in-region States after February 8, 1996, subject to subsection (j) of this section." *Id.* "The term 'in-region State' means a State in which a Bell operating company or any of its affiliates was authorized to provide wire-line telephone exchange service pursuant to the reorganization plan approved under the AT&T Consent Decree, as in effect on the day before February 8, 1996." *Id.* § 271(i)(1).

30. Mandy, *supra* note 5, at 342 ("[T]he 'carrot' of permitting BOCs to serve interLATA markets must be held out to provide incentives for BOCs to reduce barriers to entry into the local exchange business.").

31. *See* 47 U.S.C. §§ 152(a)(1), (e)(1), 153(25). *See also LATA Relief Order*, *supra* note 13, para. 9.

32. 47 U.S.C. § 271(d).

33. *Id.* §§ 251, 271.

34. *Id.* § 251.

35. *Id.* §§ 251, 271(c).

> In return for stripping the BOCs of their local-service monopoly, the 1996 Act permits them to compete in the long-distance service market—an area from which the prior regulatory scheme had banned them. . . . Congress designed the 1996 Act to spark intense competition in both the local and long-distance markets.[36]

These competitive provisions form the "centerpiece" of the 1996 Act.[37] The exclusion of the FCC's forbearance rights from the implementation of these provisions illustrates the value Congress placed on these provisions. "The FCC's privilege of 'regulatory flexibility' under the 1996 Act—a precious and hard-fought power to 'forbear' from enforcing obsolete or unreasonable portions of its statutory mandate—does not extend to the incumbent LEC provisions of section 251 or to section 271."[38] The Commission's power to revoke its approval of a BOC's section 271 application, if it believes that a BOC is no longer complying with the competitive requirements, also illustrates the force of these provisions.

A. ILECs and CLECs

An incumbent local exchange carrier is the dominant local exchange provider within a geographic area.[39] A BOC is always classified as an ILEC, but an ILEC is not necessarily a BOC, because some ILECs, such as GTE before it merged with Bell Atlantic, were the dominant local providers in particular regions and existed before the 1996 Act, but were not a part of the Bell system. The 1996 Act created a distinction between ILECs and competitive local exchange carriers ("CLECs")[40] by setting out special requirements for ILECs beyond those applicable to all local exchange carriers in order to open the local exchange markets to competition from CLECs.[41] CLECs—local exchange providers established after the enactment of the 1996 Act[42]—will generally struggle to enforce the market-opening provisions of the 1996 Act against an ILEC so that they might compete freely in the local exchange market as the 1996 Act

36. Swedenburg, *supra* note 7, at 1420.

37. Jim Chen, *The Magnificent Seven: American Telephony's Deregulatory Shootout*, 50 HASTINGS L.J. 1503, 1576-77 (1999) ("Congress plainly intended the opening of the local exchange to be the centerpiece of the Telecommunications Act.").

38. *Id.* at 1576-77 (referring to 47 U.S.C. § 160).

39. NEWTON, *supra* note 17, at 442.

40. Together, ILECs and CLECs are referred to as "LECs."

41. 47 U.S.C. § 251(c) ("In addition to the duties contained in subsection (b) of this section, each incumbent local exchange carrier has the following duties: [duty to negotiate, interconnection, unbundled access, resale, notice of changes, and collocation.]").

42. NEWTON, *supra* note 17, at 193.

envisioned.[43]

The 1996 Act contemplated three methods for CLECs to compete in local markets. First, CLECs compete through "interconnection"—building proprietary networks that they then "interconnect" to incumbents' networks.[44] This allows CLECs' customers to complete calls to and receive calls from ILECs' customers. Both the CLEC and the ILEC may charge for completing a call originating in the other's network—reciprocal compensation.[45] Second, CLECs may compete through "unbundling"—the leasing of unbundled network elements ("UNEs"),[46] the components of the local network.[47] A CLEC may lease these network elements from an ILEC or other vendors or market participants to create its own network on a piecemeal basis.[48] Finally, a CLEC may compete through the "resale" of the ILEC's services.[49] This means that the CLEC buys the ILEC's basic services at wholesale prices and resells the services at retail prices to its own customers under its own name, sometimes combining the resold service with its own service.[50] CLECs may also, and typically do, use a combination of these three methods.

B. Section 251

Section 251 of the 1996 Act delineates the competitive obligations of the various categories of telecommunications providers.[51] Subsection (a) announces the general requirement that every telecommunications carrier must "interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers."[52] Subsection (b) describes the additional obligations of local exchange carriers.[53] A local exchange carrier ("LEC"), whether ILEC or CLEC, may not frustrate "the resale of its

43. This struggle is generally two-sided. As Mark Cooper, the research director of the Consumer Federation of America, observed: "The biggest players have refused to open their markets, refused to negotiate in good faith, litigated every nook and cranny of the law and avoided head-to-head competition like the plague." William Glanz, *5-Year-Old Phone Act Has Legacy on Hold*, WASH. TIMES, Feb. 8, 2001, at B7. "I believe the RBOCs have frustrated and will continue to undermine competition at every juncture." *Hearing on H.R. 1542*, *supra* note 4 (statement of Joseph Gregori, CEO, InfoHighway Communications).

44. Hausman & Sidak, *supra* note 10, at 432.

45. *Id.*

46. *Id.*

47. NEWTON, *supra* note 17, at 936.

48. Hausman & Sidak, *supra* note 10, at 432-33.

49. *Id.*

50. *Id.*

51. 47 U.S.C. § 251 (Supp. IV 1998).

52. *Id.* § 251(a).

53. *Id.* § 251(b).

telecommunications services;"[54] must provide number portability,[55] dialing parity,[56] and access to rights-of-way;[57] and must "establish reciprocal compensation arrangements for the transport and termination of telecommunications."[58]

Subsection (c) sets out the specific requirements imposed only on ILECs.[59] An ILEC must allow interconnection to its existing local network "at any technically feasible point,"[60] unbundled access to its network elements,[61] "resale at wholesale rates [for] any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers,"[62] and physical or virtual collocation of facilities.[63]

"Section 251 was meant to spare CLECs the prohibitive expense of building new LX [local exchange] networks from scratch."[64] Requiring a telecommunications provider to create an entirely new network as its sole means of providing competitive services not only creates an insurmountable barrier to entry, but also flies in the face of the public interest, because it requires the demolition of streets and other rights-of-way to lay down a duplicative network. The ILECs have used their resources to fight their section 251 obligations.[65]

> [T]he very success of the BOCs' section 251 strategy has weakened their offensive posture in securing section 271 authorization to provide in-region interLATA carriage . . . . [T]he BOCs must now decide whether they would rather continue to repel interconnection and unbundled access under section 251, or whether they [would] like to puncture the long-distance firewall after a decade and a half of restrictions under the MFJ and section 271 of the 1996 Act.[66]

If Congress passes H.R. 1542,[67] BOCs will not have to make this choice. They may fight their interconnection obligations without fear of losing access to the lucrative interLATA market, removing their incentive to

54. *Id.* § 251(b)(1).

55. *Id.* § 251(b)(2).

56. *Id.* § 251(b)(3).

57. *Id.* § 251(b)(4).

58. *Id.* § 251(b)(5).

59. *Id.* § 251(c).

60. *Id.* § 251(c)(2).

61. *Id.* § 251(c)(3).

62. *Id.* § 251(c)(4).

63. *Id.* § 251(c)(6).

64. Chen, *supra* note 37, at 1538.

65. *Id.* ("Chronic litigation over section 251, however, has taught aspiring CLECs not to wait.").

66. *Id.* at 1577.

67. For further discussion of H.R. 1542, see *infra* Part V.

provide access to their competitors, and thereby harming consumers.

C. Section 271

According to the FCC, the agency charged with implementing the 1996 Act, "[a]t its core, Section 271 is a simple yet clever proposition: in exchange for opening their local facilities to competitors, the 1996 Act provides the BOCs with the substantial reward of the long distance 'carrot.'"[68] Unlike the MFJ, the 1996 Act permits a BOC to provide interLATA service.[69] This "incentive of long-distance entry [draws] the BOCs into cooperating with local exchange competitors."[70] As discussed in Parts VI(A) and VII(C) of this Note, section 271's incentives are working as well as can be expected against an industry segment hostile to giving up its monopoly position.[71] After the passage of the 1996 Act, consumers saw faster deployment of new local service technologies, while prices for those technologies fell dramatically. This budding competition, however, is still too fragile to remove the BOC's incentives to comply with section 251's provisions.

Currently, to receive relief from the interLATA line-of-business restrictions first imposed on it by the MFJ, a BOC must apply to the Commission for relief on a state-by-state basis.[72] The Commission then has ninety days to render a decision.[73] The Commission will not grant relief from the LATA restrictions unless a BOC satisfies four general conditions, described in the following sections.[74]

1. Track A or Track B

To satisfy the first condition, the BOC must have provided CLECs with access and interconnection to its networks in accordance with section 251 of the 1996 Act, or it must not have received any requests for such

68. *H.R. 1686 – The "Internet Freedom Act" and H.R. 1685 – The "Internet Growth and Development Act": Hearing Before the House Comm. on the Judiciary*, 106th Cong. (2000) (Statement of William E. Kennard, Chairman, FCC) [hereinafter Kennard Statement], *available at* http://www.house.gov/judiciary/kenn0718.htm (last visited Mar. 29, 2001).

69. 47 U.S.C. § 271 (Supp. IV 1998).

70. *The 1996 Telecom Act: An Antitrust Perspective: Hearing Before the Subcomm. on Antitrust, Bus. Rights, and Competition of the Senate Comm. on the Judiciary*, 105th Cong. 17 (1997) (statement of Reed E. Hundt).

71. *See Communications Industry Offers Wish List of Telecom Act Changes*, COMM. DAILY, Feb. 8, 2001.

72. 47 U.S.C. § 271(d)(3).

73. *Id.*

74. *Id.*

access or interconnection.[75] If the BOC application fits into the former category, the application is called a "Track A" application;[76] if it fits the latter classification, the Commission refers to it as a "Track B" application.[77] The two-track system avoids penalizing those BOCs who have not yet received requests from competitors, despite their compliance with section 251.[78]

2. The 14-Point Checklist

To satisfy the second requirement for general interLATA relief, the BOC must adequately fulfill the 14-point competitive checklist set forth in section 271.[79] The 14-point checklist addresses separate pieces of the market-opening provisions set out in sections 251 and 252 of the 1996 Act.[80] A BOC cannot fulfill the checklist unless it shows that it has complied with all of the various aspects of the market-opening requirements outlined in sections 251 and 252.

3. Separate Affiliate

The third condition requires the BOC to establish a separate affiliate to provide its interLATA services.[81] This separate affiliate must meet "certain structural requirements and nondiscrimination safeguards."[82] This requirement seeks to ensure that the cross-subsidization problems that formed part of the impetus for the divestiture of AT&T do not recur.

4. The Public Interest, Convenience, and Necessity

The final requirement for interLATA relief requires the BOC to show

75. *Id.* § 271(c)(1) ("A Bell operating company meets the requirements of this paragraph if it meets the requirements of subparagraph (A) or subparagraph (B) of this paragraph for each State for which the application is sought.").

76. Mandy, *supra* note 5, at 323. *See also* 47 U.S.C. § 271(c)(1)(A).

77. Mandy, *supra* note 5, at 323. *See also* 47 U.S.C. § 271(c)(1)(B).

78. Section 271 provides recourse if a BOC whose application was approved via "Track B" turns out to rebuff the provisions of section 251 when a request for interconnection does materialize. This provision allows the Commission to revoke any prior approval of a section 271 application if it finds that the applicant no longer satisfies the conditions of section 271(c).

> If at any time after the approval of an application under paragraph (3), the Commission determines that a Bell operating company has ceased to meet any of the conditions required for such approval, the Commission may, after notice and opportunity for a hearing—. . . (iii) suspend or revoke such approval.

47 U.S.C. § 271(d)(6).

79. *Id.* § 271(c)(2)(B).

80. *Id.*

81. *Id.* §§ 271(d)(3)(B), 272.

82. Mandy, *supra* note 5, at 323. *See also* 47 U.S.C. § 271(d)(3)(B).

that its provision of interLATA service is "consistent with the public interest, convenience, and necessity."[83]

IV. THE "DIGITAL DIVIDE"

The problem of the "digital divide," as Representative Tauzin eloquently overstated, is:

> [T]hose living in areas that are not near POPs, or that are not tied into a backbone facility via a gathering line are being disenfranchised of the fruits of our new economy. Without a high-speed connection to the Internet backbone, these Americans in our rural areas and inner-cities are relegated to a Narrowband Dirt Road that is so incompatible with the rest of our high-speed infrastructure that the flow of communications across our national web-based infrastructures will be significantly impeded. . . . If we all do not operate at high-speeds [sic], then the Internet cannot evolve into the fluid, nation-wide communications network that all of us are hoping it will be. . . . So, we have this digital divide in the U.S. because many people don't have access to backbone, because of where they live, and the dial-up access that they are limited to affords them only narrowband Internet services.[84]

Although Representative Tauzin may have overstated the problem in support of his bill, the dilemma of the digital divide is real. "America, including rural America, runs on telecommunications networks as it once ran on rails."[85] Unfortunately, rural areas and inner cities continue to lag behind the national average for online access.[86] Even when controlling for differences in income, rural areas remain far behind the national average.[87] "These populations are among those, for example, that could most use electronic services to find jobs, housing, or other services."[88] Despite the incredible speed of broadband deployment, some markets in rural and

83. 47 U.S.C. § 271(d)(3)(C).

84. *H.R. 1686—The "Internet Freedom Act" and H.R. 1685—The "Internet Growth and Development Act": Hearing Before the House Comm. on the Judiciary*, 106th Cong. (2000) (testimony of Rep. W.J. "Billy" Tauzin, Chairman, Subcomm. on Telecomms., Trade, and Consumer Prot.) [hereinafter Tauzin Statement], *available at* http://www.house.gov/judiciary/tauz0718.htm (last visited Mar. 29, 2001). Rep. Tauzin refers to "POPs" in his statement. A POP, or Point of Presence, "is the place your long distance carrier, called an IntereXchange Carrier (IXC), terminates your long distance lines just before those lines are connected to your local phone company's lines or to your own direct hookup. Each IXC can have multiple POPs within one LATA." NEWTON, *supra* note 17, at 692.

85. Bob Rowe, *Strategies to Promote Advanced Telecommunications Capabilities*, 52 FED. COMM. L.J. 381, 393 (1999).

86. NATIONAL TELECOMMUNICATIONS AND INFORMATION ADMINISTRATION, FALLING THROUGH THE NET II: NEW DATA ON THE DIGITAL DIVIDE, *at* http://www.ntia.doc.gov/ntiahome/net2/falling.html (last visited Mar. 29, 2001).

87. *Id.*

88. *Id.*

insular America remain shut out of this "revolution."[89] Overall, however, the divide is closing. In data released by the FCC at the close of 2000, "[t]he number of sparsely populated zip codes with high-speed subscribers increased by 69% during the first half of the year [2000], compared to an increase of 4% for the most densely populated zip codes."[90]

V. H.R. 1542: INTERNET FREEDOM AND BROADBAND DEPLOYMENT ACT OF 2001

H.R. 1542, the "Internet Freedom and Broadband Deployment Act of 2001," was introduced to the House of Representatives on April 24, 2001, in large part to "bridge" the "digital divide."[91] As discussed in Part I of this Note, H.R. 1542 took the place of H.R. 2420, which died with the close of the 106th Congress.[92] With the start of the 107th Congress, Representative

89. Much of the problem of the digital divide does not lie with the lack of high-speed Internet access in rural and insular areas, but with the lack of any Internet access or even computer at all. In fact, as of 1997, only 14.8% of the rural population and 17.3% of the central city population had Internet access of any kind. *Id.* In addition, only 34.9% of the rural population and 32.8% of the central city population had a personal computer. *Id.* Clumsily rushing to get high-speed Internet access to communities without computers may put the cart before the horse.

90. News Release, FCC, *Federal Communications Commission Releases Data on High-Speed Services for Internet Access* (Oct. 31, 2000), *available at* http://www.fcc.gov/Bureaus/Common_Carrier/Reports/FCC-State_Link/IAD/hspd1000.pdf. *See id.* at tbl. 8.

91. *Hearing on H.R. 1542*, *supra* note 4 ("broadband deployment is almost nonexistent in most of the rural areas of our country. . . . Areas in which broadband services are not available are in jeopardy. They are in jeopardy of being left out of the new Internet age.") (statement of Rep. Billy Tauzin). "This provision is essential to assure adequate internet backbone services in many rural areas of the nation . . . ." *Id.* (statement of Rep. Rick Boucher). "[T]his bill has the one hook that I think will get its undeserved support, and that hook is the promise that rural areas will magically receive access to advanced data services if we pass the bill." *Id.* (statement of Rep. Anna Eshoo).

Indeed many do support the bill in the hopes that it will address the "digital divide" that exists in their district and in rural and insular areas throughout the country. "My goal in supporting this bill is to provide access and choice to all Americans, regardless of where they live, to have the same access in rural areas as they do—as those that live in large metropolitan areas." *Id.* (statement of Rep. Steve Buyer). "I am too concerned about the digital divide in my district, and I believe that this legislation will help close that digital divide." *Id.* (statement of Rep. Eliot Engel).

This intent was manifested in hearings on the identical H.R. 2420 during the 106th Congress as well. *H.R. 2420: The Internet Freedom and Broadband Deployment Act of 1999: Hearing Before the Subcomm. on Telecomms. Trade & Consumer Prot.*, 106th Cong. 22 (2000) [hereinafter *Hearing on H.R. 2420*] (prepared statement of James D. Ellis, Senior Executive Vice President and General Counsel of SBC Communications, Inc.) ("HR 2420 . . . is a major step in the right direction to correct the imbalance in regulation and close the 'digital divide.'"). "I understand that H.R. 2420 is being touted as a solution to the rural digital divide." *Id.* at 34 (prepared statement of Dhruv Khanna, Executive Vice President and General Counsel, Covad Communications).

92. *See supra* note 4 and accompanying text.

Tauzin has taken over as Chairman of the House Commerce Committee, after the retirement of the former Chairman Representative Thomas Bliley.[93] In his position as Chairman, and "probably the most powerful supporter of the nation's 'competitive' carriers," Representative Bliley made sure that Representative Tauzin's bill was never introduced on the House floor.[94] Prior to the close of the 106th Congress, Representative Tauzin had gathered support for H.R. 2420 from 224 cosponsors,[95] making it likely that H.R. 1542 will pass the House this term, with Representative Tauzin as Chairman of the House Commerce Committee.[96]

H.R. 1542 modifies section 271 of the 1996 Act to include data services within the definition of "incidental services" mentioned in 47 U.S.C. § 271(g),[97] and sets out various terms to deregulate the provision of data services by ILECs.[98] Currently, section 271 does not distinguish between voice and data service in its restriction on BOCs.[99] It does allow for the provision of interLATA service, however, when used for a purpose falling within the definition of an "incidental interLATA service."[100] H.R. 1542 seeks to include the broad category of data services among the narrow categories already delineated in section 271. Although other bills exist that seek to grant similar relief to BOCs,[101] this Note focuses on H.R. 1542

93. David McGuire, *Bells, Rivals Gear Up for Battle*, WASH. POST, Feb. 28, 2001, at G13 (noting that retiring Representative Thomas J. Bliley, former Chairman of the Commerce Committee, blocked H.R. 2420's consideration by the full committee during the 106th Congress, despite the bill's strong support in the House).

94. *Id.*

95. *Bill Summary & Status for the 106th Congress, H.R. 2420, at* http://thomas.loc.gov/bss/d106query.html (last visited Apr. 26, 2001). H.R. 1542 had 78 cosponsors as of its introduction in the House. *Bill Summary & Status for the 107th Congress, H.R. 1542, at* http://thomas.loc.gov/bss/d107query.html (last visited Apr. 26, 2001).

96. McGuire, *supra* note 93. Some feel that Rep. Tauzin is pushing this bill too hard, too fast. The bill was (re)introduced April 24, 2001, went to a full committee hearing April 25, 2001, and moved to markup in the Telecommunications Subcommittee on April 26, 2001, the day this issue went to press. "Rep. Cox (R-Cal.) said members were being 'deprived of the opportunity to think.' Rep. Markey (D-Mass.) said going to markup day [sic] after hearing was 'disrespectful of the issues at stake,' and promised to offer multiple amendments." *Bell Deregulation Bill Seen Clearing Telecom Panel Today*, COMM. DAILY, Apr. 26, 2001.

97. Internet Freedom and Broadband Deployment Act of 2001, H.R. 1542, 107th Cong. § 6 (2001).

98. *Id.* § 4.

99. 47 U.S.C. § 271 (Supp. IV 1998).

100. *Id.* § 271(g). Incidental interLATA services mainly deal with audio and video programming to subscribers, alarm monitoring services, Internet services to elementary and secondary schools, and signaling information. *Id.*

101. Perhaps the most notable initiatives include H.R. 1685 and H.R. 1686 from the 106th Congress and the Broadband Internet Access Act of 2001 (H.R. 267 and S. 88) from the 107th Congress.

because its predecessor enjoyed substantial bipartisan support in the House, it was sponsored by the current Chairman of the influential House Commerce Committee, and, therefore, it appears likely to pass the House.[102]

VI. CURRENT ALTERNATIVES TO CHANGING THE LAW

H.R. 1542 nullifies much, if not all, of the incentive the 1996 Act created for BOCs to open their markets to competition. The question remains whether extreme measures such as those proposed in H.R. 1542 are necessary to achieve the commendable objective of providing rural and insular areas with greater opportunities for high-speed Internet access. As stated in the hearings on H.R. 1542's predecessor, H.R. 2420, "[p]erhaps most telling is the fact that, if there is a problem here, it can be addressed far more narrowly than by legislation that rejects the incentive-based framework of the 1996 Act."[103] This Note suggests that the government needs no additional law to achieve the goal of increased high-speed Internet access for rural communities.

Section 271, as written, provides interLATA data (and voice) relief to BOCs. The section simply requires that BOCs comply with the law as set forth in sections 251 and 252. Notwithstanding sections 251 and 252, however, the FCC has provided a mechanism for BOCs to receive targeted interLATA relief for data services provided to rural areas.[104] These two methods provide BOCs with interLATA data relief, just as H.R. 1542 does, without removing the competitive incentives of the 1996 Act. InterLATA relief for the provision of data services, however, is not the only way to provide high-speed Internet access to rural and insular areas. Other technologies provide means for high-speed Internet access as well.

A. Section 271

Unlike in the days before the 1996 Act, BOCs currently have the means to provide both voice and data interLATA services. By satisfying the requirements of section 271, a BOC may gain access to the long-

102. "Lobbyists on other side [sic] also were fairly resigned to bill's passage. 'We're expecting that it's going to pass,' ALTS Pres. John Windhausen said . . . ." *Bell Deregulation Bill Seen Clearing Telecom Panel Today*, COMM. DAILY, Apr. 26, 2001. *Bill Summary & Status for the 106th Congress, H.R. 2420, at* http://thomas.loc.gov/bss/d106query.html (last visited Apr. 26, 2001). This bill had more than one hundred cosponsors from each major party. *Id.*

103. *Hearing on H.R. 2420, supra* note 91, at 43 (prepared statement of Len Cali, Vice President, Federal Government Affairs, AT&T).

104. *LATA Relief Order, supra* note 13.

distance market.[105] If a BOC decides that it can prove to the Commission that it has successfully complied with the competitive provisions of the 1996 Act, it may apply for the right to provide all interLATA services.[106] The Commission must render a decision on any section 271 application within 90 days.[107] Thus, "this legislation is unnecessary because, under current law, the BOCs themselves hold the key to obtaining the authority to provide any long distance service by opening their local markets to competitors."[108]

If Congress simply leaves the law as it currently stands, BOCs maintain the power to quickly obtain access to the lucrative long-distance market, while Congress assures that the market-opening provisions of the 1996 Act will not be sacrificed unnecessarily. Two BOCs have already benefited under section 271 in the past 18 months.[109] The FCC approved section 271 applications for both Verizon in New York and Massachusetts and SBC in Texas, Kansas, and Oklahoma.[110] In approving their applications, the Commission decided that these companies had earned the right to provide long-distance service.

B. Application for LATA Boundary Modification or Waiver

BOCs argue that section 706 of the 1996 Act requires that the Commission eliminate LATA restrictions in order to "encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans."[111] In the *Advanced Services Order*, the FCC rejected this contention.[112] In that *Order*, however, the FCC went on to discuss the possible need for LATA boundary modifications to ensure that rural and underserved customers received

105. 47 U.S.C. § 271(c), (d).

106. *Id.*

107. *Id.* § 271(c)(3).

108. *Hearing on H.R. 2420*, *supra* note 91, at 42 (prepared statement of Len Cali, Vice President, Federal Government Affairs, AT&T).

109. *See* FCC, *Section 271 Applications*, *at* http://www.fcc.gov/Bureaus/Common_Carrier/in-region_applications (last visited Apr. 26, 2001) (listing BOCs' 271 applications and their corresponding regions). Verizon has an application currently pending before the FCC to provide interLATA service in Connecticut and SBC has filed an application to gain 271 approval for Missouri. *Id.*

110. *Id.*

111. 47 U.S.C. § 157(a). The quote continues: "(including, in particular, elementary and secondary schools and classrooms)." *Id.* Significantly, section 271 already contains an exception to the LATA restrictions to allow BOCs to provide Internet access to elementary and secondary schools. *Id.* § 271(g)(2).

112. Deployment of Wireline Servs. Offering Advanced Telecomms. Capability, *Memorandum Opinion and Order and Notice of Proposed Rulemaking*, 13 F.C.C.R. 24,011, 24,049-50, 13 Comm. Reg. (P & F) 1 (1998).

high-speed Internet access.

Then, in its *LATA Relief Order*, the FCC directly addressed this question.[113] The Commission determined that it would make boundary modifications to LATAs and waive LATA restrictions in cases where a two-prong test was met.[114] The first prong requires that "the LATA boundary modification be necessary to encourage the deployment of advanced services on a reasonable and timely basis to all Americans."[115] The second prong of the test requires that the Commission decide that the types and degree of services that BOC claims to provide would not "remove its incentive to apply for permission to provide other interLATA service under section 271."[116]

In the *LATA Relief Order*, the FCC specifically addressed the same problem that H.R. 1542 seeks to address, but did so in a much more tailored manner. Indeed, the *Order* states:

> [W]e reiterate that any relief we may grant to ensure that all Americans receive the benefits of advanced services will be narrowly tailored. We do not intend, by granting any LATA modification, to enable a BOC (or its affiliate) to provide full Internet backbone or other broadband infrastructure services either within a state or across multiple states. For the Commission to allow a BOC to provide backbone services to the public prior to the BOC's being granted permission to provide interLATA services pursuant to section 271 could greatly diminish the BOC's incentive to seek 271 relief.[117]

Thus, the Commission recognized that providing wholesale interLATA relief would remove the incentive for BOCs to comply with the competitive provisions of the 1996 Act, and it tailored the interLATA relief to narrowly address the stated problem.

The Commission's *LATA Relief Order* provides a mechanism to address the digital divide. "[T]o the extent that there may be instances where a LATA boundary is standing in the way of consumers getting broadband services from BOCs, the Commission has set up a LATA boundary modification process."[118] If a BOC wanted to provide high-speed Internet access to a rural or insular area that did not have this type of service, it merely must file an application with the Commission. Despite the Commission's solution to the very problem H.R. 1542 purports to

113. *LATA Relief Order*, *supra* note 13.

114. *Id.*

115. *Id.* para. 16.

116. *Id.*

117. *Id.* para. 26.

118. Kennard Statement, *supra* note 68.

solve, no BOC has applied for this type of relief.[119]

> The simple reason why rural customers, and other customers in unserved and underserved areas, are not yet being served as robustly as we would like is not caused by legal impediments. Rather it is largely about simple economics. Providing customers with sophisticated services in areas of low density is an expensive undertaking.[120]

BOCs are not rushing to apply for the right to serve rural areas because those areas simply do not yield substantial profits. Despite this inaction, BOCs lobbied hard for the passage of H.R. 2420 and continue to lobby for its successor, H.R. 1542, a bill that encompasses within its purpose the very same intention of the ignored *LATA Relief Order*.[121]

C. Other Technologies

Legislation and administrative law are not the only means to address the problem of the digital divide. As has happened in many areas of the law, technology has foiled the best legal intentions. In this case, however, "competition among technologies as well as providers"[122] has proven to be an alternate solution to the problem of the "digital divide." As Representative Anna Eshoo stated at hearings on H.R. 1685 and H.R. 1686 last summer: "The so-called 'incentives' for RBOCs to roll out DSL are unnecessary because clearly there are signals that competition already exists in this market. Cable companies have two-way high speed cable technology to potentially compete with RBOCs."[123]

Cable companies do not pose the only competition for LECs in providing high-speed Internet access, however. "Wireless technologies—both terrestrial and satellite—are also on the scene. High-speed Internet service via satellite is available today virtually everywhere in the United States, including rural areas."[124] Thus, as Representative Eshoo and former Chairman Kennard have rightfully pointed out, LECs do not constitute the only source of high-speed Internet access for rural areas.

Section 271, the *LATA Relief Order*, and alternate technologies all

119. *See* Network Servs. Div., *Local Access and Transport Areas (LATA) Issues*, *at* http://www.fcc.gov/ccb/nsd/documents/LATA.HTML (last visited Mar. 31, 2001).

120. Kennard Statement, *supra* note 68.

121. *Hearings on H.R. 1542*, *supra* note 4.

122. *Id.*

123. *H.R. 1686—The "Internet Freedom Act" and H.R. 1685—The "Internet Growth and Development Act": Hearing Before the House Comm. on the Judiciary*, 106th Cong. (2000) (statement of Rep. Anna G. Eshoo) [hereinafter Eshoo Statement], *available at* http://www.house.gov/judiciary/esho0718.htm (last visited Mar. 30, 2001).

124. Kennard Statement, *supra* note 68.

demonstrate ways that the current law and technology address the digital divide. These alternate solutions render legislation like H.R. 1542 unnecessary, and, if such legislation is passed, it will harm the consumers in rural and urban areas alike.

VII. WORKING THE SYSTEM: WHY H.R. 1542 IS HARMFUL TO CONSUMERS

Despite the fact that they have shown no interest in addressing the problem of the digital divide, BOCs lobbied hard for the passage of H.R. 2420, and continue to show their staunch support for H.R. 1542, although addressing the problem of the digital divide is the stated purpose of H.R. 1542. This apparent paradox can be solved by examining the past behavior of BOCs.

> According to the chairman of the FCC, the Commission has already proposed a compromise with the BOCs that would allow them to provide essentially unregulated data services through a subsidiary, but the BOCs have refused this compromise in anticipation that their lobbyists can produce a better result through legislation that effectively circumvents the requirement of section 271 of the 1996 Act.[125]

For BOCs, H.R. 2420 embodied the legislation for which they had been waiting. Without regard to the purpose of the bill, BOCs strongly supported H.R. 2420, and continue to support H.R. 1542, because it provides them with wholesale interLATA relief for data services.

A. Such Legislation Is Not Tailored to the Problem of the Digital Divide

H.R. 1542 is not designed to truly address the digital divide. As one witness noted in hearings on H.R. 2420 last summer: "Nor is this bill directed at promoting broadband deployment in rural areas. Make no mistake—H.R. 2420 is a direct blow to broadband entrants . . . . [I]t will not help most rural areas."[126] Congress maintains the unrealistic hope that the incentive of interLATA relief for data services will bring BOCs streaming into the rural and neglected low-income urban markets. This type of legislation "does not guarantee the deployment of advanced services anywhere. Congress should address broadband deployment to rural and urban areas directly and in a competitively and technologically neutral

125. Steve Bickerstaff, *Shackles on the Giant: How the Federal Government Created Microsoft, Personal Computers, and the Internet*, 78 TEX. L. REV. 1, 81-82 (1999).

126. *Hearing on H.R. 2420*, *supra* note 91, at 32-33 (prepared statement of Dhruv Khanna, Executive Vice President and General Counsel, Covad Communications). Covad is a CLEC providing DSL access. *Id.*

way—not by removing the Bells' incentives to open their local markets."[127]

B. InterLATA Relief for Data Services Is No Small Prize

'BOC support for H.R. 2420 and H.R. 1542 does not stem from a deep desire to enter low-income and isolated areas; it originates instead from the call of the lucrative interLATA data services market. Although in the past voice services have constituted the majority of traffic over the long-distance networks, current technology has changed the environment to bring data services to the forefront. "[C]urrently, the majority of traffic traveling over long haul networks is data traffic, not voice, and analysts predict that data traffic will make up 90 percent of all traffic within four years."[128]

Because of data service's burgeoning role in the long-distance economy, granting interLATA relief for data services alone no longer represents an insignificant concession. "In a world where data is experiencing explosive growth and is rapidly outpacing voice traffic, allowing the BOCs to carry long distance data traffic before they have satisfied the requirements of Section 271 would severely undermine the BOCs' incentive to open their markets."[129]

Technology presents a further glitch in the "data-doesn't-mean-much-anyway" argument. Technological advances are quickly rendering the data/voice distinction insignificant. "[S]ince voice traffic can readily be 'packetized' or converted to data traffic, an exemption for data is an exemption for voice."[130] Thus, if Congress passes H.R. 1542, BOCs could convert voice traffic to a packet-switched network. This would mean that traditional voice long distance would be converted into a data service, potentially allowing BOCs to circumvent the entirety of section 271's interLATA restrictions.

127. Letter from NARUC to Henry J. Hyde, Chairman, House Judiciary Committee (May 11, 2000).

128. *Hearing on H.R. 2420*, *supra* note 91, at 42 (prepared statement of Len Cali, Vice President, Federal Government Affairs, AT&T). *See also* Kennard Statement, *supra* note 68.

129. Kennard Statement, *supra* note 68.

130. *H.R. 1686 – The "Internet Freedom Act" and H.R. 1685 – The "Internet Growth and Development Act": Hearing Before the House Comm. on the Judiciary*, 106th Cong. (2000) (testimony of Randall B. Lowe, Executive Vice President and Chief Legal Officer, Prism Communications Services, Inc.), *available at* http://www.house.gov/judiciary/lowe0718.htm (last visited Mar. 30, 2001). Criticism of H.R. 1542 on this basis was clear in recent hearings: "Unfortunately, as I look at the bill I have to conclude that it is a sham. You cannot separate digital—you cannot separate voice from data. If you cannot separate voice from data, how can you have data relief?" *Hearing on H.R. 1542*, *supra* note 4 (statement of Rep. Charles Pickering).

C. The Technological Environment Prior to the 1996 Act

The passage of H.R. 1542 would result in grievous setbacks for consumers best illustrated by the technological environment before the 1996 Act, a time when the BOCs enjoyed a local exchange service monopoly. "It's important to note that the Bells had DSL technology but did not offer it. Instead, they offered the more expensive 'T-1' lines to businesses."[131] "[I]ncumbents were selectively deploying only one form of DSL—called HDSL—and charging businesses upwards of $1000 to $1500 per month for this 'T1' service."[132] The ILECs offered the significantly more expensive T1 service, despite the fact that "DSL technology has existed for more than 10 years."[133] The ILECs' lackadaisical attitude toward the roll-out of fast, inexpensive technology changed dramatically with the introduction of competition into the local exchange market. "[S]purred by this growing broadband competition, the incumbent carriers have responded with their own burgeoning DSL deployment."[134] The provision of DSL service "now appears to be driven by the threat of competition."[135] This competition has not only induced ILECs to deploy DSL, and to do it faster, "but where competition exists, it is also forcing the incumbent carriers to reduce their DSL charges to consumers."[136]

D. H.R. 1542 Undermines the "Delicate Balance" of the 1996 Act: It Is Too Soon for Total Deregulation of Data Services

The preamble to the 1996 Act proclaims that it aims to "promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies."[137] Many BOC proponents hitch their arguments to the "reduce regulation" language in this preamble. In truth, this preamble actually sets out the "delicate balance" that the 1996 Act achieved between the competing interests and benefits derived from less regulation and more

131. Eshoo Statement, *supra* note 123.

132. *Hearing on H.R. 2420*, *supra* note 91, at 33 (prepared statement of Dhruv Khanna, Executive Vice President and General Counsel, Covad Communications).

133. *Hearing on H.R. 2420*, *supra* note 91, at 41 (prepared statement of Len Cali, Vice President, Federal Government Affairs, AT&T).

134. *Id.*

135. Bickerstaff, *supra* note 125, at 76.

136. *Hearing on H.R. 2420*, *supra* note 91, at 41 (prepared statement of Len Cali, Vice President, Federal Government Affairs, AT&T).

137. Preamble to the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified as amended in scattered sections of 47 U.S.C.).

competition.[138]

Competition in the local market has taken great strides in the five years since the enactment of the 1996 Act, but "[d]espite all regulatory hope, meaningful local competition has not yet emerged, and [there is] no point in coddling the BOCs until it does."[139] As Senator Hollings said in the days leading up to the enactment of the 1996 Act: "[t]elecommunications services should be deregulated after, not before, markets become competitive."[140] Deregulating telecommunications services before the market has become competitive, however, is exactly what H.R. 1542 sets out to do. "Competition is still too nascent to abandon the pro-competitive elements of the Act."[141]

The 1996 Act corrected for the possibility of a premature deregulation of the telecommunications market through section 271. Only when a BOC has shown that it has taken every step required to open its markets to competition will the Commission lift its LATA restrictions. The strategy encompassed in H.R. 1542 destroys competition by tipping the balance in favor of deregulation. As former Chairman Kennard stated:

> I am sure that increased competition is the well-meant intention of the proposed legislation. Inadvertently, however, I believe this legislation will not only upset the balance struck by the 1996 Act, but it actually would reverse the progress attained by the 1996 Act. In an effort to move us forward, this bill mistakenly moves us backward.[142]

E. The False Premise that H.R. 1542 Amends the 1996 Act to Account for the Internet

Some proponents of H.R. 1542 argue that the competitive provisions of the 1996 Act did not contemplate the Internet, and H.R. 1542 merely amends the 1996 Act to account for the Internet's impact on telecommunications policy.[143] Despite these contentions, however, section

138. Kennard Statement, *supra* note 68 ("The genius of the Telecommunications Act of 1996 (1996 Act) is the delicate balance it strikes between regulation and deregulation to achieve competition in all forms of communications, and to deploy the fruits of that competition to all of the American people.").

139. Chen, *supra* note 37, at 1579. Chen, once a proponent of this sort of deregulation, acknowledged his change of heart by saying "[w]rite today, regret tomorrow, renounce mañana." *Id.* at 1580.

140. 142 CONG. REC. 2010 (1996) (statement of Sen. Hollings).

141. *H.R. 1686—The "Internet Freedom Act" and H.R. 1685—The "Internet Growth and Development Act": Hearing Before the House Comm. on the Judiciary*, 106th Cong. (2000) (statement of Glenn Ivey, Chairman, Maryland Public Service Commission and National Association of Regulatory Utility Commissioners ("NARUC") representative), *available at* http://www.house.gov/judiciary/ivey0718.htm (last visited Mar. 30, 2001).

142. Kennard Statement, *supra* note 68.

143. Tauzin Statement, *supra* note 84 (stating "[In] 1995, the year we spent crafting the

271 did contemplate the Internet. Section 271(g)(2) of the 1996 Act provides an exception to the interLATA restriction for "Internet services over dedicated facilities to or for elementary and secondary schools."[144] Congress clearly contemplated that interLATA services could be used to provide Internet access, and created an exception in section 271(g)(2) to assure Internet access to schools. *Inclusio unius est exclusio alterius*[145]—any argument claiming that the additional exceptions contained in H.R. 1542 are necessary to encompass the advent of the Internet is misplaced.

VIII. CONCLUSION

Although the digital divide remains a worthy concern, H.R. 1542 does not bridge this gap. The removal of interLATA data restrictions from BOCs will not provide an incentive for them to enter the underserved rural and insular markets, but will only allow them to move unfettered into the interLATA markets of any region they consider profitable. The rural and insular markets H.R. 1542 sets out to benefit do not correspond to the profitable markets likely to lure BOCs if they receive generalized interLATA relief for data services. Because of the ability to packetize voice traffic, BOCs would gain unfettered access to all components of the lucrative long-distance market after the passage of H.R. 1542, despite its "data-only" restriction. Allowing interLATA data (and, essentially, voice) relief without requiring a showing that a BOC has opened its local markets to competition to the satisfaction of the FCC would remove the core of the 1996 Act.

Without the ability to interconnect to BOCs' networks, gain access to UNEs, and resell services, CLECs would not be able to compete. Creating a telecommunications network from scratch would be the only option available to CLECs; however, the related insurmountable economic and public policy barriers to entry would assure the CLECs' demise. The loss of competition in the local exchange market through legislation such as H.R. 1542 will harm consumers by raising prices and eliminating choices. Congress must realize that the good intentions of such legislation will only lead Congress and its constituents down the path to the remonopolization of the local exchange market.

legislation that would become the Act[,] . . . [t]he Internet was not on our radar screen . . . . In light of this, I do not propose re-opening the Act. Rather, I feel that it must be updated.").

144. 47 U.S.C. § 271(g)(2) (Supp. IV 1998).

145. BRYAN A. GARNER, A DICTIONARY OF MODERN LEGAL USAGE 432 (2d ed. 1995) ("[T]o include or express one thing implies the exclusion of the other, or of the alternative.").